Supreme Court, U.S.
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No. 90-1016

In The

Supreme Court of the United States

October Term, 1990

THE CONSOLIDATED CITY OF JACKSONVILLE,
DUVAL COUNTY, FLORIDA,
A MUNICIPAL CORPORATION,

Petitioner,

v.

WINSTON NASH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The Eleventh Circuit correctly analyzed *Nash II* and reinstated the ruling for Respondent in *Nash III*. The Eleventh Circuit re-examined the case in light of the Supreme Court decision, *Wards Cove Packing Company Inc. v. Atonio*, 490 U.S. 642 (1989). The key principle in *Wards Cove* was the absence of an identifiable, specific factor needed for a disparate impact case. However, Respondent made a prima facie case by identifying the examination and promotional process as the barriers. The Petitioner presented no evidence to refute it. In addition, the Eleventh Circuit's decision in *Nash II* and *Nash III* were also based on at least six violations of EEOC guidelines, 29 CFR 1607, committed by the Petitioner. Further, the Petitioner never fully complied with Eleventh Circuit's mandates when they were issued. Now the Petitioner comes before this honorable Supreme Court seeking to perpetuate the historical and continuous, discriminatory system that operates unrestrained and outside EEOC guidelines. The Petitioner attempts to sanitize this glaring and chronic, discriminatory system. This attempt is demonstrated by articulated and abstract evidence, which is not based on the record.

The Petition for Writ of Certiorari should be denied.

ARGUMENT

I

THE ELEVENTH CIRCUIT DID NOT DISREGARD THE SUPREME COURT MANDATE, AND *NASH II & III* ARE NOT CONTRADICTION TO *WARDS COVE V. ATONIO*

The Eleventh Circuit correctly analyzed *Nash II* and decided that it did not contain the defects in *Wards Cove*.

The standards set by the Supreme Court in *Wards Cove,* concerning an identifiable barrier were met by respondent in his prima facie disparate impact case. The prima facie disparate impact case was made and not refuted by the Petitioner.

The Petitioner argues that it demonstrated approved content validity for the examination. This claim is contrary to the record in this case. The Petitioner created its own content validity approach and ignored guidelines set forth by EEOC. Further, the Petitioner caused the examination to be withheld from evidence at trial.

The Petition for Writ of Certiorari should be denied.

II

THE ELEVENTH CIRCUIT DID NOT ERRONEOUSLY RESTRICT THE TYPE OF EVIDENCE IT CONSIDERED LEGALLY SUFFICIENT TO ARTICULATE A BUSINESS JUSTIFICATION DEFENSE

The Petitioner caused the examination to be withheld from evidence, then attempted to rely on the lack of evidence as a defense. However, standards set by EEOC guidelines covering construction of examinations and content were not complied with by the Petitioner. In fact, the Petitioner has indicated that no evidence is needed to refute a prima facie, disparate impact case. Further, the Petitioner had many options concerning the promotional process. The City utilized those options in the past to promote white males.

What the examination process did, according to court records, was to select only white males for promotion, with the total exclusion of blacks. Evidence was also

given by the Petitioner's own examiner, who stated that supervisory knowledge, skills, and abilities could not be tested on the examination. Further, the only difference between the responsibilities for firefighter and fire lieutenant is the fact that a lieutenant supervises. Thus, an examination that does not test for that supervisory knowledge, skill and ability could not be content valid or job related. Petitioner's examination has no business justification.

The Eleventh Circuit's decision does not conflict with *Wards Cove* or other case law.

The Petition for Writ of Certiorari should be denied.

III

THE ELEVENTH CIRCUIT DID NOT VIOLATE THE "LAW OF THE CASE" DOCTRINE

In *Nash III*, the Eleventh Circuit did not contradict *Nash I*. The Petitioner suggests the Eleventh Circuit ruled that the City exceeded its burden of production. That finding is not in the *Nash I* decision. The *Nash I* decision states that the City went much beyond mere articulation. However, going much beyond mere articulation does not meet EEOC guidelines in 29 CFR 1607. Further, in *Nash I* the Eleventh Circuit ruled to reverse the District Court's decision based on additional factors in the case. No contradictions exist in the Eleventh Circuit's decisions.

The Petition for Writ of Certiorari should be denied.

IV

THE ELEVENTH CIRCUIT DID NOT VIOLATE STARE DECISIS AND THE PRINCIPLE OF INTERPANEL ACCORD

The Eleventh Circuit correctly decided in *Nash I, Nash II* and *Nash III* that the Petitioner had not carried its burden. This finding is consistent in each case. The Eleventh Circuit properly applied the law governing disparate impact cases. All standards set in *Wards Cove* were met.

In *Nash I,* contrary to what the Petitioner implies, the Eleventh Circuit did not rule that the City's evidence was legally sufficient. The Petitioner continues in its petition with this misleading and inaccurate theme, as if it were factual. It is not. Nowhere in the *Nash I* decision, does the Eleventh Circuit find that the Petitioner's evidence is sufficient.

The examination process that the Petitioner used violated 29 CFR 1607, EEOC guidelines numerous times. Thus, creating disparate impact. Further, the examination process had no business necessity, was non-validated and served as an absolute barrier.

The Petition for Writ of Certiorari should be denied.

V

THE ELEVENTH CIRCUIT DID NOT ERR BY RULING AGAINST THE CITY AND IS NOT IN CONFLICT WITH *ANDERSON V. LIBERTY LOBBY, INC.*

At trial, Petitioner produced no evidence except that of articulation. In fact, the Petitioner caused the examination questions to be withheld from evidence. Petitioner

has consistently suggested that articulation of how the examination was constructed, be used as its best evidence in attempting to overcome a prima facie, disparate impact case. Petitioner also pursues an avenue which implies that *Wards Cove* removes all responsibility for production of evidence from the Petitioner in litigations.

Petitioner seeks to make the trial court's articulation of how the examination was constructed as evidence. However, the trial court is only paraphrasing what had been articulated by the Petitioner.

Petitioner states in its petition that the questions were drafted according to EEOC guidelines, 29 CFR 1607. That statement is contrary to court records. The Petitioner's own expert's testimony contradicts the claims of compliance. In *Nash II* at (A-76):

> 5. The transcript of trial reads:
>
> Q (counsel for defendant) Did you evaluate the examination as to whether or not it related to job performance?
>
> A (defendants expert) as far as job performance, No
>
> The defendant's expert also testified that he was not familiar with the principles of validation and the use of personnel selection procedures set forth by the American Psychological Association. The EEOC's guidelines, 29 C.F.R. 1607. Arbemarle, 422 U.S. at 430-31 & n.29, 95 S. Ct. at 2378 & n.29.

Thus, if the City's expert witness does not know the principles of validation according to EEOC guidelines, 29 CFR 1607, then the guidelines were not followed. Further,

the Petitioner's examiner also testified that the supervisory knowledge, skills and abilities could not be tested. In *Nash II* (A-79):

> The City admitted through the testimony of its current personnel examiner that the examination did not test the one aspect of job performance that differentiated the job of firefighter engineer from fire lieutenant (combat): *supervisory skills*.

Petitioner strongly states in its petition that in *Nash I* the Eleventh Circuit found that the City had exceeded its burden. However, no such findings are recorded in that decision. *Nash I* findings were that the City had not met its burden.

Petitioner had no business justification for the disparate impact created by the examination and promotional process. The City violated numerous EEOC guidelines in every aspect of the examination and promotional process.

The Petition for Writ of Certiorari should be denied.

CONCLUSION

As the Eleventh Circuit properly recognized, relief to Respondent was justified. The Petitioner has historically ignored EEOC guidelines in every aspect of promotions. Now the City seeks confirmation of an overtly discriminatory promotional process.

This Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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